Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RONALD BOYAJIAN,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA STATE COURT OF APPEAL FOURTH APPELLATE DISTRICT DIVISION THREE

PETITION FOR WRIT OF CERTIORARI

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4pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether (a) the privacy of the attorney-client relationship essential to the Sixth Amendment right to assistance of counsel may be overridden by exceptions to the Fourth Amendment warrant requirement, and (b) whether resulting penetration of the defense violates the Sixth Amendment.

2. Whether the State of California Courts have misapplied the principles of McNeil resulting in violating Massiah and the petitioner's right to counsel under the Sixth Amendment.

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IN THE SUPREME COURT OF THE UNITED STATES

RONALD BOYAJIAN,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION THREE

The petitioner, Ronald Boyajian, respectfully prays that a writ of certiorari issue to review the judgment in the Court of Appeal of the State of California Fourth Appellate District Division Three entered on December 31, 1998.

OPINION IN THE COURT BELOW

The Court of Appeal of the State of California Fourth Appellate District Division Three entered its unpublished opinion affirming the conviction of petitioner on December 31, 1998. A copy of the opinion is attached as Appendix A.

STATEMENT OF JURISDICTION

On December 31, 1998 the Court of Appeal of the State of California Fourth Appellate District Division Three entered its opinion affirming the conviction of petitioner in this case. A copy of the opinion is attached as Appendix A.

On March 31, 1999, the Supreme Court of the State of California filed an order denying the petition for review. This order is attached as Appendix B. The Court of Appeal of the State of California Fourth Appellate District Division Three had previously filed an order denying the petition for rehearing on January 29, 1999. This order is attached as Appendix C. This Court's jurisdiction to review the judgment of the Court of Appeal of the State of California is conferred by 28 U.S.C. 1254

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FOURTH AMENDMENT
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

SIXTH AMENDMENT *(in relevant portion)*
In all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

I. Course of the Proceedings and Facts Material to the Issues

Petitioner was convicted by jury in a consolidated trial of 18 counts of consensual unlawful sexual intercourse with two 16 - 17 year old teenage minors, (CA Pen. Code § 261.5) and four counts of consensual unlawful oral copulation with one of the minors (CA Pen. Code §288a, subd.(b)(1)).

Appellant was arrested and arraigned on misdemeanor charges involving unlawful sex with Kristen S., which were filed on March 10, 1993 by the Orange County District Attorney. Sgt. O'Sullivan, of the Newport Beach Police Department, was in personal charge of the Kristen investigation. On May 27, 1993 petitioner 's counsel, Marshall Schulman, appeared and entered pleas of not guilty, and the case was pending trial. The pending offenses were refiled and raised to felonies in the course of subsequent numerous proceedings where petitioner was represented by attorney Schulman throughout. (RT 1769-1770)

Newport Beach Police Officer Sgt. O'Sullivan, while investigating the Kristen S. case which was pending trial, and for which he had appeared at the preliminary hearing, personally initiated an investigation of 16 year old Shauna C.'s activities in the city of Irvine, and then turned his investigation over to Detective Prouty, his junior subordinate officer in the same Newport Beach Police Department unit.

On October 15, 1993, seven months after the initiation of the Kristen criminal judicial proceedings against petitioner, and for which petitioner was still represented by attorney Schulman, Shauna C., was a confidential police agent [RT 1641] working on behalf of the Newport Beach Police Department and, in conjunction with the Orange County District Attorney's office, placed a scripted tape-recorded set-up call to the petitioner from the police station. (RT 1221-1222) Petitioner was later arrested for charges involving consensual unlawful sexual intercourse with Shauna C. Attorney Schulman appeared for petitioner on the Shauna case on October 21, 1993 and numerous proceedings ensued in parallel as to both the Kristen case and the Shauna case, including their ultimate consolidation for a single trial.

The District Attorney of Orange County actively sought consolidation of counts involving Kristen and Shauna on

the theory that the cases involved the same class of crimes and were connected together in their commission by numerous common elements of substantial importance. Ultimately the District Attorney succeeded; the charges involving the two girls were joined and tried together, and defense request to sever was denied. (CT 138-173, see also RT 1768-1774]

On March 14, 1994, about 4 PM Sgt. O'Sullivan and detective Prouty made a vehicle stop of petitioner just after he received confidential materials from his attorney Schulman, and in which vehicle their own confidential police agent Shauna was a passenger. The officers then placed petitioner under arrest for being in the presence of Shauna in violation to the bail condition, followed by a search and seizure of the contents of the vehicle. Sgt. O'Sullivan broke the key to the car and had the vehicle impounded.

At the Municipal court proceeding the following day, March 15, 1994, the court granted the defense motion that the seized documents and tapes not be reviewed. The court issued its order for law enforcement and the District Attorney's office to not further review any documents. People submitted as to the documents and stated they had already listened to the tapes. Attorney Schulman, raised both Sixth amendment and Fourth Amendment issues in the Municipal Court (CT 786-787) Additional unlawful sexual intercourse charges involving Shauna C. were filed against petitioner .

At the Superior Court penal code section 1538.5 hearing on the defense motion to suppress the seized materials, petitioner testified that the closed bags in his vehicle contained documents that he prepared for his attorney Schulman. Petitioner also testified, that he informed one of the officers that Mr. Schulman must be contacted immediately because petitioner was in possession of confidential material he had just *received* from attorney Schulman. Petitioner insisted that counsel should be

informed before anyone touched anything in the car. (RT 154-155, 170-171)

While searching the bags Detective Prouty observed notebooks with writings by appellant concerning attorney, Marshall Schulman. Schulman was known by the officers to be appellants defense attorney as to the pending Kristen charges and the pending Shauna charges. Detective Prouty testified the seized materials included what Schulman will attempt to do to do as far as the case is concerned, talk about the trial, the investigation, and possible defenses. (RT 106-107, 110.)

Sgt. O'Sullivan and Detective Prouty continued to examine these materials later at the police station in great detail, reading every word, listening to every tape, over several separate days, without ever obtaining a warrant. Among the seized materials were several hundreds of pages of material [RT 104], over 500 items of evidence and documents [RT 389-390].

At some point, Detective Prouty received a telephone call from the District Attorney, directing him to stop reviewing the tapes and documents without further guidance from that office. (RT 113.) Detective Prouty further testified that that request was prompted by a request from petitioner's attorney, Mr. Schulman, who asked that the police refrain from searching until he had an opportunity to ascertain whether there were attorney client materials in the bags. (RT 114) Although no warrant was ever sought or obtained the search was resumed by Prouty on orders from Sgt. O'Sullivan who told Detective Prouty he had "received word" that they could continue examining the evidence. (RT 114.)

The court denied the motion to suppress on the basis that the materials were properly seized incident to arrest and that the evidence was admissible under the doctrine of inevitable discovery. [RT 189]

The defense at trial attacked the credibility of the two women using their prior statements to police and the courts, letters, and diaries. Defense counsel also elicited the witnesses' substantial monetary incentives for the defendant's conviction. Defendant did not testify at trial.

At trial, over defense objection on 6th Amendment right to counsel under Massiah, an audiotape of the police scripted Shauna set-up call to petitioner of October 15, 1993 was played for the jury. (RT 1224, 1768.) Shauna's opening question in the scripted set-up call was "**Is your attorney there**?" The jury heard through the taped conversation references to the Kristen case, the investigations, and Shauna, including discussion that Shauna did not have to talk to the police until the Kristen case was over.

At mid-trial, the court declined defense request and inquiry for a preliminary hearing before the court would determine what portions of the seized documents and tapes it would permit the District Attorney to introduce. (RT 1264) In sorting through the seized materials which the District attorney intended to introduce, the court repeatedly stated the materials were clearly lawyer-client trial preparation, and acknowledged by both the defense counsel and the District Attorney. (RT 1290-1301) The court permitted redacted portions of the materials to be admitted after defense objection, "It is all a violation of Massiah."(RT 1301)

The redacted tapes and documents were played and introduced to the jury over re-objections by the defense. The court on several occasions assured counsel that all of his objections, had been made and would be continuing and that he need not make them further. Two related defense motions for mistrial resulted when a portion of materials previously ruled inadmissible were introduced to the jury, which motions were denied (RT 1927-1930)

At the final day of trial, late disclosed evidence from the recorded interview between Sgt. O'Sullivan and Shauna immediately after the petitioner's arrest on March 14, 1993 at about 4 PM. The additional facts and sequence of events were that both Shauna and Kristen retained the same civil attorney to sue petitioner, and spoke with Sgt. O'Sullivan, several hours before the Shauna called petitioner to meet her in violation of the bail order resulting in the arrest. Shauna testified she wrote out before the meeting how she intended to spend the $300,000 she expected to receive upon petitioner's conviction.

II. When Federal Issues Were Raised & Passed On

A. Sixth Amendment Right To Counsel Under Massiah: as to the Shauna C. set-up tape

The defense raised objections at trial of the Sixth Amendment violation of the defendant's right to counsel under Massiah as to the playing of the Shauna set-up tape to the jury.(RT 1224, 1768.)

The trial court denied the motion to exclude the conversation, concluding that no Sixth Amendment violation resulted from use of the tape-recording because the investigation of the Shauna C. allegations was independent of the investigation of the pending Kristen S. charges, and the conversation between appellant and Shauna did not in any way involve the facts of Kristen's case (RT 1773-1774.

Petitioner raised on appeal that the trial court erred in permitting the playing of the Shauna set-up tape under the McNeil "specific-offense" limitation. (AOB, pp. 68-74, ARB 28-34) The court of appeal concluded there was no error, indirectly citing the McNeil "offense-specific" limitation. The court of appeal also stated, "In any event, any error could only have been harmless. Given the sum of the evidence against defendant, there is no reasonable

probability he would have obtained a more favorable outcome absent the admission of the tape-recorded conversation."(opn. p. __)

Petitioner again raised this Massiah issue on a petition for rehearing, which was denied. This Massiah issue was also raised in a petition for review to the Supreme Court of California, which was denied.

B. Sixth Amendment Right To Counsel:

i. Invading the Attorney-Client Relationship through the Seized Materials

ii Massiah Claim as to the Seized Materials

Defense counsel raised a Sixth Amendment right o counsel concern in the Municipal Court hearings on March 15, 1994 and on March 23, 1994 [CT 786-787] after the warrantless search and seizure and arrest of petitioner on March 14, 1994 for Shauna's presence with him in the vehicle in violation of the bail condition to not see Shauna. At trial, counsel Schulman objected to the court's redacting and rulings on admissibility of portions of the seized materials the District Attorney wished to present to the jury, as work product and Massiah violations. The court found there was substantial amount of "lawyer -client trial preparation material. [RT 1301] The court ruled the redacted materials would be allowed, without citing any reason [RT 1312-1322]. As each item in dispute was eventually introduced to the jury, the court assured the re-objecting defense counsel "I think it's clear you have made the appropriate objections, each and every available one..."[1976-1977] and "I appreciate you've made and we've had hearing on several of the exhibits that have been received, particularly the tapes, the cassettes, the handwritten notebooks and other papers, and the court's permitted portions thereof into evidence. They will all be received with Mr. Schulman's caveat that the objections he's raised

heretofore are not waived by not further making them at this time and that they continue on. Is that fair?
[District Attorney] McNerney: Yes, your Honor..." [RT 2004-2005].

The Sixth Amendment right to counsel issue was raised in conjunction with the Fourth Amendment violation issue on appeal (see AOB pp. 85-87, ARB PP. 36-39). The court of appeal did not address petitioner's Sixth Amendment claim. Petitioner re-raised his Sixth Amendment claim in the petition for rehearing, which was denied. The Sixth Amendment issue was raised on petition for review in the Supreme Court of California, which was also denied.

C. Fourth Amendment; Protection From Unreasonable Search and Seizure Of Private Papers, therein, included Materials Protected by Attorney-Client Relationship

On March 15, 1994, the day following the warrantless arrest and search and seizure of petitioner in the vehicle stop for being in the presence of Shauna c in violation of a bail condition, defense counsel moved for a protective order so that law enforcement and the District Attorney office would not further review the seized materials. The court granted the motion. [CT 786-787]. Counsel raised his concern about both Fourth and Sixth Amendment issues on March 23, 1993 in the Municipal Court. The subsequent defense motion to suppress in the Superior Court was denied, on the basis of inevitable discovery, and search incident to arrest. [RT 189]

On appeal, the Fourth Amendment issue reinforced by appellant's Sixth Amendment right to counsel issue as to the seized materials were again raised (AOB pp. 85-87, ARB pp. 36-39). The court of appeal agreed with the trial court that the warrantless search of the seized materials permissible under both inevitable discovery and search incident to arrest.

Petitioner re-raised the Fourth amendment warrantless search of the seized "protected" materials again in conjunction with the Sixth Amendment aspects in a petition for rehearing, which was denied. The same issue was raised on petition for review to the Supreme Court of California, which also denied review.

REASONS FOR GRANTING THE WRIT

THE DECISIONS IN THIS CASE CONFLICT WITH THE *PRECEDENTS* OF THIS COURT ON IMPORTANT ASPECTS OF THE SIXTH AND FOURTH AMENDMENTS

Introduction

Seldom does a case present so vivid a confluence of Sixth and Fourth amendment issues. The grounds for review set forth have yet to be squarely decided by this Court. This Court's past decisions do suggest, however, that the ruling of the trial court and the court of when considered in the context of the competing consitutional interests this case presents, are open to serious doubt. They require resolution by this Court.

I. Right to counsel: penetrating the defense through attorney client privilege and work product

The right to privacy of confidential communications between a criminal defendant and his defense counsel is the essence of the Sixth Amendment protection. Moreover, the trial court's statements and the District Attorney's concessions, illustrate that defense work product was in the hands of the prosecution, which itself was arguably obtained through possible violation of Massiah v. United States, 377 US 201 (1964) suggests the purpose and safeguards of the attorney-client relationship may require additional scrutiny under current constitutional doctrines.

The principles enunciated by some of this Court's earlier decisions impacting the viability of attorney client relationships under various challenges to disclosure may not have yet adequately reached such issues as raised in petitioner's case. Weatherford v. Bursey, 429 U.S. 545 (1977), Swidler & Berlin v. United States, 524 U.S. 399 (1998) United States v. Zolin, 491 U.S. 554 (1989) Upjohn Company v. United States 449 U.S. 383 (1981) .

II. Applicability of Fourth Amendment warrant requirement to protect attorney-client privilege and work product material.

One principle enunciated in the far-reaching decisions embodied by this Court in Stone v. Powell (1976) 428 U.S. 465, stated that one's papers are totally different than typical crime scene evidence. This case brings to the forefront whether privacy of papers, tapes, or other media are or can be protected under current Fourth Amendment doctrine.

When a search involves disclosure of materials entitled to the protection of the attorney-client privilege, application of Fourth Amendment principles may conflict with the Sixth Amendment's right to counsel; it remains unclear whether despite the normal application of an exception to the Fourth Amendment's warrant requirement, a search warrant nevertheless must be obtained when the People seek access to privileged matters. That is the question here.

With knowledge that petitioner had been charged in the Shauna matter and released on bail on condition that he refrain from contacting her, police investigators acting on a [anonymous] tip stopped the automobile that appellant was driving and in which Shauna was a passenger, placed him under arrest, and seized the vehicle's contents, including documents and tapes that petitioner maintained were confidential privileged communications with his lawyer, then

later examined these materials in detail--without first obtaining a search warrant.

The justification relied upon was the custodial arrest as the predicate for the *seizure* of appellant's assertedly protected materials.The court of appeals rejection of petitioner's challenge to the subsequent *inspection and review* of the tapes' and documents' contents at the police station under Michigan v DeFillipo (1979) 443 U.S. 31, 34, is based on a faulty analogy. More apt, petitioner has suggested, is the resolution of the balance of constitutional rights implicated by cases involving the subsequent warrantless search of material protected under the First Amendment, under Justice Stewart's concurring opinion in Stanley v. Georgia (1969) 394 U.S. 557, 569-572, as adopted by the plurality in Walter v. United States, 447 U.S. 649, 653-660. The proper resolution of this constitutional tension represents an important question that has evaded this Court's review thus far.

III. Applicability of the "'offense-specific' limitation": unanticipated circumstances make McNeil precedent irreconcilable with the Sixth Amendment

This case also presents important questions under Massiah v. United States (1964) 377 U.S. 201. As was true when this Court first addressed the scope of McNeil v. Wisconsin, 501 U.S. 171, at 187 "The Court therefore does not flesh out the precise boundaries of its newly created "offense-specific" limitation on a venerable constitutional right."(Stevens, J., dis.) Two important aspects of McNeil's holding are at issue here. The first is whether the interrelated nature of the Kristen and Shauna charges invoked the exception some courts have recognized to the "offense-specific" limitation, "'when the pending charge is "so inextricably intertwined with the charge under investigation that the right to counsel for the pending charge cannot constitutionally be isolated from the right to counsel for the

uncharged offense."'" (U.S. v. Martinez, 972 F2d.1100, 1100-1103-1104, quoting U.S. v. Hines (9th Cir. 1992) 963 F2d 255, 257. The second is whether, assuming the admissibility of the phone conversation between Shauna and petitioner concerning the as-yet uncharged Shauna offenses (Maine v. Moulton, 474 U.S. 159, 180, fn. 16), was that evidence nonetheless inadmissible as to the Kristen charges under Moulton and Massiah?

Neither the conclusion of the trial court or the court of appeals is supported by this Court's statements in McNeil; both lower courts enlarge McNeil's "limitation" beyond its stated purpose and threaten to undermine the Sixth Amendment principles established by Massiah. Their proper application is squarely at issue here; the necessity to review them is plain.

Discussion of Sixth Amendment, Fourth Amendment

A significant aspect of petitioner's contention that this motion to suppress was erroneously denied is based on the authorities' discovery of attorney-client privileged documents and cassette tapes, which petitioner has contended precipitated the need for a warrant under the Fourth Amendment as reinforced by his Sixth Amendment right to counsel. (AOB, pp. 85-87; ARB pp. 36-39.)

Indeed, the fact that shortly thereafter the District Attorney became involved in advising the officers whether the search should continue logically supports if not compels the inference that the potential for a breach of the privilege was called to the officers attention-- and thereafter ignored. It strains credulity to imply that the People may not have been on notice of the necessity for a warrant.

The record is undisputed that the government -- the police *and the District Attorney's office* -- had been informed by petitioner's attorney that the bags contained documents

appearing to memorialize confidential legal communications concerning appellants pending criminal charges. Yet after short cessation of the search, a deliberate decision was made to continue a word-by-word examination of petitioner's writings and audiotapes without submitting these items to a magistrate to screen for items protected by the attorney-client privilege. With what Prouty and O'Sullivan knew, not to mention the prosecution's involvement, the decision to proceed with that review absent a search warrant was indefensible.

The court's refusal to be troubled by the probing inspection of petitioner's writings and tapes at the station long after his arrest is inexplicable. That determination only begs the question whether the authorities ever have a duty under the Fourth Amendment to obtain a warrant before proceeding further with a search of evidence permissibly seized as incident to arrest when they discover attorney-client privileged materials such as appellant's notebooks and tapes. As does the court's suggestion that once the incriminating materials were seized and examined--but only superficially at the arrest site, "[t]o the extent the officers conducted further review, it was not a new search." (opn. p.__.) How else is one to describe the minute and methodical search and inspection of the same items at the police station as was evident from the officers' description of how that later "search" was conducted? Nor is there merit to the suggestion that "the situation appears analogous to testing of suspected controlled substances seized at an arrest site to confirm the presence of drugs." (Ibid., citing Michigan v. DeFillipo, supra, 443 U.S. at p. 34.)

In contrast with the questionable analogy to the seizure and subsequent testing of contraband drugs, appellant has advance d this Court's 1980 decision in Walter v. United States, supra, 447 U.S. 629 which requires more rigorous analysis of warrantless intrusions by law enforcement when competing constitutional interests are at stake. In Walter, of course, an accused's First Amendment privacy interests

triggered the warrant requirement; here, petitioner's vital interest in the confidentiality of his attorney-client communications, and work product material, interests implicating the Sixth Amendment right to counsel, was the significant factor. In such circumstances, Walter tells us that the existence of probable cause to believe the seized items contained evidence of a crime is not enough to excuse the failure to obtain a warrant as a condition to further scrutiny. That message was not heeded by the officers; now it is ignored by the lower courts.

The analogy to Michigan v. DeFillipo, supra, 443 U.S. 31 is incorrect. Neither the First Amendment nor the Sixth amendment comes into play when *contraband* is lawfully seized and thereafter subjected to the further search entailed in laboratory testing to analyze the exact contents of the suspected unlawful substance. When a lawfully seized writing appears to contain matter protected by the attorney-client privilege, however, scrupulous adherence to the Fourth Amendment's warrant requirement must be observed to avoid infringement of important Sixth Amendment interests. Apt in that situation is this Court's recognition, "if probable cause dispensed with the necessity of a warrant, one would never be needed." (Walter v. United States, supra, 447 US at p. 657, fn.10.) That is a core principle which should control this claim.

The court of appeals questionable reliance upon DeFillipo -- its opinion never mentions Walter, cited repeatedly by appellant-- is equally troubling in its alternative conclusion that the trial court properly also held the search was justifiable under the inevitable discovery doctrine. (opn., pp. 8-9, citing Nix v Williams, 467 U.S. 431.) In petitioner's case, however, the People's ultimate access to the challenged evidence is not a foregone conclusion. Intrusions into the "defense camp" and trial strategy by police and prosecution raise serious due process concerns , which can be avoided by appropriate referral to a magistrate which can result in protective orders after in camera review .

Thus, the inevitable discovery doctrine can be applied here only by sailing in uncharted water.

Both rationales on which the court of appeal upheld the denial of petitioner's motion to suppress evidence in this case failed to consider important competing values inherent in the search of contents of otherwise lawfully seized documents that the authorities are *on notice* contain confidential information *privileged* as between the defendant and his attorney. Whether the Fourth Amendment absolutely requires that a search warrant be obtained is unsettled in the circumstances, but the analogy to cases involving the testing of the contents of contraband is clearly misplaced; the constitutional and statutory protections afforded the right of counsel and maintaining inviolate the privilege of confidential communications suggests that the requirement of a warrant when materials are protected either by the Sixth or the First Amendment is a more appropriate analogy. Finally, those same interests defeat reliance upon the inevitability of access to such protected materials, at least on a record such as this where the authorities deliberately subverted those protected interests. This court should grant review to resolve these important questions.

2. **Eviscerating Massiah and the closely related doctrine -- through invasion of the Right to the assistance of counsel: defendant faced with superior legal acumen of prosecutor**

Two important and related questions arising under the Sixth Amendment right to counsel are presented by the trial court's ruling admitting Petitioner's tape-recorded conversation with Shauna, prearranged and scripted by the police, at a time when "adversary judicial proceedings" already were pending against Petitioner in connection with the Kristen charges. Both stem from the 1991 decision of the Supreme court establishing an "offense-specific" limitation on the Sixth Amendment right to counsel in McNeil. The focus of these

two problems, however, is distinct. Their factual context may be briefly summarized.

The defense argued that use of the Shauna set-up tape violated Petitioner's Sixth amendment rights as established by this Court's seminal 1964 decision in Massiah, because he was already represented by counsel on the closely-related Kristen charges when the October 15, 1993 set-up call from Shauna was instigated by the same investigating officers. (RT 1768-1773.) It was undisputed that by then Petitioner had been arrested and arraigned on felony charges involving Kristen, which had originally been filed on March 10, 1993; on May 27, 1993, Petitioner had an attorney, he had entered pleas of not guilty and the case was pending trial. (RT 1769-1770.) Nevertheless, the trial court denied the motion to exclude the conversation, concluding that no Sixth Amendment violation resulted from use of the tape recording because the investigation of the Shauna C. allegations was independent of the pending Kristen S. charges, and the conversation between Petitioner and Shauna did not in any way involve the facts of Kristen's case. (RT 1773-1774.)

In Massiah, the United States Supreme Court held that neither state nor federal governments may use an undercover agent to circumvent the right to counsel guaranteed the accused by the Sixth Amendment once that right has attached. As later explained in McNeil v. Wisconsin, supra, 501 U.S. at p.175, the Sixth Amendment right to counsel attaches once a prosecution is commenced by the initiation of adversary judicial criminal proceedings, by way of formal charge, preliminary hearing, indictment, information, or arraignment.

Insofar as Petitioner's statements were ruled admissible in connection with the Shauna C. charges, the applicability of McNeil's "offense-specific" limitation of Massiah presents a challenging question. The People argued, and the trial court found, that the Sixth Amendment right to counsel had not yet attached to the offenses involving Shauna at the time of the

October 15, 1993 telephone conversation since adversary judicial criminal proceedings had not yet been initiated as to those charges. The court's determination disregards abundant factual indicia of the interrelated nature of the Kristen and Shauna charges, and the exception to the "offense-specific' limitation some court's recognize "'when the pending charge is so "inextricably intertwined with the charge under investigation that the right to counsel for the pending charge cannot constitutionally be isolated from the right to counsel for the uncharged offense."'" (U.S. v Martinez, supra, (9th Cir. 1992) 972 F2d 1100, 1103-1104, quoting U.S. v Hines, supra, (9th Cir. 1992) 963 F2d 255, 257; see also U.S. v Melgar (4th Cir. 1998) 139 F.3d 1005 [new federal charges involving the same conduct as pending state case were inextricably intertwined].)

In virtually all salient respects, petitioner's case has no parallel to the facts in McNeil, wherein here the Kristen and Shauna investigations could not have been more inextricably intertwined. To begin with, the two investigations were being simultaneously handled by the same officers of the Newport Beach Police Department, Detective Prouty and Sgt. O'Sullivan. The charges were the same, involving unlawful acts of sexual intercourse and /or oral copulation with teenage minors. Moreover, much of the sexual activity with both girls allegedly occurred in appellant's Newport Beach apartment, in motels, or in his car at locations in Irvine. Furthermore, by October 15, 1993, the many parallels between the two cases had already been recognized by the investigating officers. O'Sullivan and Prouty were actively pressuring a reluctant Shauna to cooperate with the prosecution, using such techniques as playing for her the tape-recorded conversation of appellant speaking with Kristen. (RT 1428.) Additionally, the same defense counsel was representing petitioner simultaneously in both case before and after consolidation.

Accordingly, on October 15, 1993, Petitioner's Sixth Amendment right to counsel in the pending Kristen case

could not be properly isolated, for constitutional purposes, from his right to counsel with respect to the as-yet uncharged Shauna crimes. Proof that Petitioner had employed similar means of initiating and perpetuating an unlawful sexual relationship with Shauna as he employed with Kristen necessarily strengthened law enforcement's case against him in the Kristen prosecution, which unquestionably had commenced seven months earlier. The fact that the police had other legitimate reasons for eavesdropping-- t o obtain evidence supporting independent allegations of unlawful sexual activity with Shauna-- did not mean that evidence of the tape-recorded conversation was admissible, without any limitations as to its use, at the consolidated trial of all charges involving Kristen and Shauna. To allow such unrestricted use of the evidence by the People effectively eviscerated Petitioner's Sixth amendment right to counsel as to both sets of crimes. (Maine v Moulton, supra, 474 U.S. 159, 178-180; The intertwined relationship of the Kristen S. and the Shauna C. charges distinguishes this case from McNeil.

Even assuming the tape-recorded conversation with Shauna was properly admitted for the limited purpose of proving the charges involving Shauna (Maine v. Moulton, supra, 474 U.S.at p.180, fn.16), the question remains as its admissibility to prove the charges involving Kristen. In overruling petitioner's Sixth Amendment objection to the evidence, the trial court assured counsel of its intention to give instructions addressing the limited use of the evidence, presumably as to the Shauna charges; however, no such instructions were in fact given. (RT 1773.)

In its haste to reject Petitioner's Sixth Amendment argument based on Massiah v US, supra, 377 U.S. 201 that the tape-recorded conversation with Shauna must be excluded as to all counts, the Court of Appeal completely neglected to address a critical component of the argument, viz., that even if Shauna's conversation with Petitioner was admissible to prove the counts involving *Shauna*, that evidence was *not* admissible as substantive evidence to prove the *Kristen*

charges without violating Massiah. (see AOB, pp. 73-74, ARB, pp. 28-34.) Petitioner requests a determination of *that* issue as well.

The court also went astray in holding McNeil dispositive of appellants entire Massiah claim. Even assuming the court correctly applied McNeil as supporting the introduction of the tape-recorded conversation with Shauna *to prove the charges involving Shauna*, by no stretch of the imagination does McNeil sanction the unrestricted use of the tape-recording *to prove the counts in which Kristen is the alleged victim*. The "offense-specific" limitation is just that, namely, an exception to the application of Massiah's Sixth Amendment principles. If appellant's right to counsel attaches to offense as to which adversary judicial criminal proceedings have been initiated--and to such offenses alone, how can it be said that McNeil controls the Kristen charges?

The cross-admissibility of the *charges* pursuant to evidence code section 1101 for severance purposes has no bearing because it does not speak to claim that a Sixth amendment violation results form allowing use of a particular *piece of evidence* obtained in disregard of Massiah. Even when a defendant's crimes are adjudged cross-admissible, it does not inexorably follow that every piece of evidence proving one crime is admissible to prove all others.

The lower court's improper and extension of McNeil limitation, goes far beyond the principles stated in Massiah or McNeil. To permit subtantive use of evidence of the conversation with Shauna to prove the Kristen counts would mean that any agent of law enforcement with legitimate reasons to continue investigating a defendant's criminal activities could easily circumvent the right to counsel in any pending case by surreptitiously inducing inculpatory statements related to uncharged criminal acts as to which the right to counsel had not yet attached; such statements could then be used without limitation in a trial consolidating

original and new charges with those pending when the statements were obtained without the benefit of counsel.

Accordingly, as Petitioner urged below (see AOB, pp. 73-74; ARB, pp. 28-33) -- but the court of appeal inexplicably failed to address -- it is Maine v Moulton that governs the disposition of the Kristen counts. Incriminating statements obtained in violation of Massiah principles are inadmissible to prove charges as to which the right to counsel had attached even if the statements were obtained during the good faith investigation of other crimes. (Moulton, supra, at p. 180.) Conversely, under Moulton incriminating statements pertaining to other crimes for which the right to counsel has not yet attached are admissible to prove "those" offenses."(Id, at p. 180, fn. 16) It appears to follow that if the statements as to Shauna were admissible to prove the Shauna charges, they were not admissible to prove the Kristen charges.

Accordingly, review is necessary to consider the application and scope of McNeil in these two important respects.

CONCLUSION

For the reasons set forth above, Petitioner respectfully submits that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION THREE

FILED December 31, 1998

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION THREE

THE PEOPLE,	)	G017741
	)	
Plaintiff and Respondent,	)	(Super. Ct. No.
	)	93HF0509)
	)	
v.	)	OPINION
	)	
RONALD GERALD BOYAJIAN,	)	
	)	
Defendant and Appellant.	)	
	)	

Appeal from a judgment of the Superior Court of Orange County, Robert E. Law, Retired Judge of the Municipal Court. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Dennis A. Fischer and Melissa Hill for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Esteban Hernandez and A. Natasha Cortina, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Ronald Boyajian of 18 counts of unlawful sexual intercourse and 4 counts of oral copulation involving 2 different minors, and the court found multiple Penal Code section 12022.1 bail enhancement true. Boyajian's appeal raises a host of issues, but we affirm.

I

Ronald Boyajian will never be welcome in Mister Roger's neighborhood. Boyajian was hired as a math tutor for high school sophomore Kristen S. in January 1991. Paring some eight years of his actual age, he told then fifteen year old Kristen he was only twenty-two years old.

Boyajian and Kristen met once during the summer and resumed tutoring sessions two or three times a week when school started in the fall. At some point their conversations strayed to topics other than mathematics. Boyajian started to discuss his troubles with his live-in girlfriend Valency Romero. he also inquired about Kristen's personal life, including her boyfriends.

Boyajian eventually advised Kristen of his romantic interest in her. Later, he told Kristen he loved her and wanted to make her his girlfriend. On November 8, he met Kristen in Pacific Palisades and drove her to a motel in Malibu. Kristen consumed an alcoholic beverage Defendant purchased for her. They went to one of the rooms and engaged in oral copulation and sexual intercourse.[1] Kristen started to cry and Defendant told her to be quiet because other people might hear her.

Confused and upset, Kristen returned home and argued with her parents. Afterwards she ran away from home and joined Defendant. Boyajian invited Kristen to move into the apartment he shared with Romero in Newport Beach. During the next three weeks, Boyajian and the minor engaged in oral copulation and sexual intercourse whenever Romero was absent. Boyajian also tried to convince Kristen to seek emancipation from her parents so she could live with him

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1 Kristen had never had intercourse before this incident.

and have a "better life."

Meanwhile, Kristen's father retained two private investigators to "abduct" his daughter and transport her to the Crisis Prevention Center (CPC) in Westwood. She remained at CPC for two weeks and returned to her parents' home just before Christmas. Kristen's parents also obtained a restraining order prohibiting defendant from having any further contact with their daughter.

Angered by her parents' response, Kristen moved into her grandmother's house in Santa Monica. By January 8, 1992, she ran away and fled to Defendant's apartment. Boyajian promised Kristen she would have a better life, be safe, and need never worry abut confinement in a hospital. He also arranged for her to spend the night at a hotel in Huntington Beach.

Kristen returned to Boyajian's apartment the next day. The couple engaged in multiple acts of oral copulation and sexual intercourse during the next few weeks. Sometime around January 21, Defendant told Kristen she needed to leave his apartment because private detectives were watching and plotting to return her to CPC. He arranged for her to move into Heather Pfarr's Westminster residence. Following Defendant's orders, Kristen registered for classes at Orange Coast College under a false name. The couple continued their sexual encounters while Kristen lived with Pfarr.

Newport Beach Detective William Yourex visited Defendant's apartment on February 5. Defendant denied seeing Kristen, acknowledge the restraining order, and promised to notify the detective if Kristen contacted him. Defendant secretly continued his relationship with Kristen and tried to intimidate her parents into dissolving the restraining order.[2]

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2 Apparently defendant has Kristen call and write her mother's supervisor at the Los Angeles County School District with a warning that her mother was unfit to teach. He also planned to have Kristen call Child Protective Services to report abuse.

Kristen returned to defendant's Newport Beach apartment in March and lived there until June, when her parents arranged for her removal. During this period she engaged in sexual intercourse and oral copulation with defendant on a regular basis. Defendant also encouraged Kristen to abandon her car and to drop out of the community college.

In June, Kristen's parents transported her to a center for troubled children in Utah. Kristen wrote several letters tot he domestic relations court seeking emancipation and asking to remain with defendant. She was willing to do or say anything Boyajian wanted.

Kristen started counseling in September. She began to cooperate with police and detailed her sexual relationship with Defendant. In December 1995, she participated in a tape-recorded phone conversation in which Boyajian acknowledged their sexual encounters and his intent to make her his girlfriend.

Boyajian commenced a sexual relationship with then 16-year old Shauna C. while charges were pending against him in the Kristen S. Case. Shauna met defendant at the beach in late August or early September of 1993. He told her he was 25 years old. Shauna and a girlfriend attended a party at defendant's apartment that night, and he obtained her phone number. Afterwards, Defendant met Shauna at the beach or for lunch on a regular basis and eventually told her he wanted a relationship with her. When school started, defendant would pick up Shauna and her girlfriend and take them to his apartment or out for lunch. He told Shauna about his affair with Kristen and claimed her parents sent her away. Both girls received keys to his apartment.

On the evening of September 17, defendant had intercourse with Shauna at his apartment when they returned from a high school football game. Defendant told Shauna he "really cared" for her and wanted their relationship 'to work."

Several days later, Defendant complained to both Shauna and her girlfriend Jenny about Shauna's reluctance to engage in oral sex. He told Jenny he was having intercourse with

Shauna and questioned her virginity. A short time later, defendant told Jenny that Shauna was now giving their relationship "100 percent."

Shauna fell in love with defendant and did whatever he asked. He told her they could get married in Las Vegas when she was 17. He also claimed she could be emancipated form her mother and come live with him. Eventually, he confessed his true age.

Shauna told her mother about her relationship with defendant. Her mother insisted on a meeting. Defendant admitted having sexual relations with Shauna; at the mother's urging, they went for AIDS testing. Shauna's mother eventually reported the relationship to the police and took her daughter tot he Newport Beach Police Department on October 12, 1993. Shauna promptly informed defendant about her meting with Detective Prouty. Defendant told her they could no longer see each other. he also told Shauna to call his private detective, Mr. Box, and tell him they never had a sexual relationship.

As instructed, Shauna called Box and denied any sexual contact with defendant. Box obtained Shauna's consent to record the conversation. The next day, Shauna's mother brought her to see Detective Prouty and the girl reported her conversation with Box. Prouty set up a recorded call between Shauna and Boyajian. During this conversation, Shauna told defendant she was concerned about the police. Defendant reassured her everything would be all right "just as long as you don't tell [the officer investigating the Kristen offenses]. " He instructed her to tell the police they had never had sex and not to worry about perjury charges. Boyajian threatened to kill Shauna's father if he came after him and to report her mother for child abuse she consent tot heir relationship when she asked them to get an AIDS test. He also threatened to sue Shauna's mother "for everything she'd had [sic]"

A few hours later, Shauna met defendant near her home and warned him their conversation had been recorded. Approximately one month later, defendant resumed his

sexual relationship with Shauna. She would page him, and he would call back to arrange a meeting place away from his apartment. On certain occasions they had sex in defendant's car, but she complained and he would try to find a motel that did not require identification to register. Sometimes he used a fake driver license bearing the name "Ron Scarpello."

In March 1994, Detective Prouty and Sergeant Patrick O'Sullivan commenced surveillance of Shauna's house after they received an anonymous tip that she was planning to meet defendant at a Tustin motel. Defendant picked Shauna up a short distance from her house. The officers stopped the car a few blocks away and placed defendant under arrest. A search of the vehicle yielded several bags containing condoms and the fake driver license, as well as incriminating microcassette tapes and documents. Shauna told O'Sullivan about her recent sexual encounters with defendant and described what happened on these occasions.

Defendant did not testify at trial. Defense counsel cast Kristen in the role of an unhappy teenager coerced into making false claims against the only person who tried to help her. He claimed Shauna's accusations were part of a plan to extort money from Boyajian in a civil action.

II

Defendant challenges the denial of his pre-trial motion to suppress the evidence recovered in a warrantless search of his vehicle at the time of his arrest. The trial court ruled the search was proper under either the "incident to arrest" or 'inevitable discovery doctrines. We agree.

In late October or early November, 1993, defendant surrendered himself on the charges pertaining to Shauna and agreed, as a condition of bail, to refrain from contacting the minor. On march 14th, 1994, Sergeant O'Sullivan received an anonymous telephone tip alerting him to a meeting between defendant and Shauna that afternoon in front of a store and their plan to drive to a motel for a sexual encounter. O'Sullivan and Prouty stopped and placed

defendant under arrest . According to O'Sullivan, the ignition key broke off when he attempted to remove defendant's car form the intersection. He observed several large bags in the car and ordered Prouty to search it for evidence of defendant's continuing sexual relationship with the minor.

O'Sullivan, a veteran officer and then the supervisor for the juvenile sexual assault section, knew defendant was out on bail and a court order was in effect barring him from any contact with Shauna. In a prior interview, Shauna told O'Sullivan that defendant always used a condom during intercourse. And Romero, defendant's "other" girlfriend, had reported defendant's practice of making tape recordings of girls he was involved with, including Shauna.

Prouty conducted the search approximately ten minutes after the arrest occurred. Inside an open bag in the front seat he found a note stating, I told Val [Romero] we had sex." Prouty also found defendant's fake drivers license as well as other papers and spiral notebooks referencing sex and "the situation' they were investigating." Another bag contained condoms, clothing items, and a tape recorder with tapes. Prouty collected the bags and took them to the police station. Defendant's car was towed and impounded. The officers conducted thorough search at the station and spent hours reviewing the various tapes and documents.

Defendant denied any of the bags were open or that the note mentioning sex was protruding from one of the bags. He claimed he told the officers the bags contained attorney-client documents and to contact his attorney because they held privileged material. Both officers testified defendant made no such claims.

As *New York v. Belton* (1981) 453 U.S. 454, 460-463 explains, "when an officer has made a lawful custodial arrest of a driver, the officer is entitled to search the passenger compartment of the vehicle and may also examine the contents of any containers found within the passenger compartment, whether or not it is reasonably probable that such a container might hold a weapon or evidence relating to the offense for which the driver has been arrested." (*People*

v. Molina (1994) 25 Cal.App.4th 1038, 1042.) Having observed defendant's violation of the bail condition prohibiting any contact with Shauna, the officers were entitled to make an arrest. It necessarily "follows that they were entitled to search the [passenger] compartment and its containers as a sent incident to lawful arrest. As the search of the compartment and containers was lawful, the evidence found therein is admissible evidence." (*Ibid.*)

Defendant claims the officer's later review of the tapes and documents at the police station was too remote to fall within the classification of a search incident to arrest. Not so. All of the incriminating materials were seized and examined at the arrest site. To the extent the officers conducted a further review, it was not a new search. In fact, the situation appears analogous to testing of suspected controlled substances seized at an arrest site to confirm the presence of drugs. (See *Michigan v. DeFillippo* (1979) 443 U.S. 31, 34.)

As an alternative basis for its ruling, the trial court also held the search was justifiable under the inevitable discovery doctrine. *Nix v. Williams* (1984) 467 U.S. 431 describes standards relevant tot he application of this exception: If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense." (id. at p. 444) As this court has since observed, "[t]he test, as to the likelihood of eventual discovery, is not one of certainty, but rather of a reasonably strong probability." (*People v. Huston* (1989) 210 Cal.App.3d 192, 221.)

Here, there can be no doubt all of the tapes and documents would have been discovered in an inventory search after impound of the car. Once these items were located and identified, the officers, based on their experience and familiarity with the facts of this case, would have been aware of the reasonably strong probability that they would find additional evidence of defendant's continuing sexual

activity with Shauna. That, in turn, would provide sufficient probable cause to obtain a warrant and conduct an extended review of the materials seized. For these reasons, the trial court's ruling was also justified under the doctrine of inevitable discovery.

III

Defendant next challenges the sufficiency of the evidence to support many of his numerous unlawful sexual intercourse and oral copulation convictions.

We affirm. Our review is limited: "'The proper test for determining a claim of insufficiency of evidence in a criminal case s whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth of falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the factfinder.'" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Generic testimony detailing molestation charges is sufficiently substantial from an "evidentiary standpoint" if it "outlines a series of specific, albeit undifferentiated incidents, each of which amounts to a separate offense, and each of which could support a separate criminal sanction. (*People v. Jones* (1990) 51 Cal.3d 294, 313, 314.) We note "the particular details surrounding a child molestation charge are not elements of the offense and are unnecessary to sustain a conviction." (Id. at p. 315) But the victim must describe the kind of acts or acts committed with sufficient specificity . . . [and] the number of acts committed with sufficient certainty to support each of the counts alleged information or indictment . . . . Finally, the victim must be

able to describe the general time period in which these acts occurred . . . to assure the acts were committed within the applicable limitation period. Additional details regarding the time, place or circumstance of the various [incidents] may assessing the credibility or substantiality of the victim's testimony, but are not essential to sustain a conviction." (Id. at p. 316.)

The court gave a modified version of the standard CALJIC No. 4.17.5 instruction, detailing the charges against defendant after the prosecutor's election. As modified, the instructions stated the prosecution was required to prove each charge beyond a reasonable doubt and the jurors were required to unanimously agree on the facts constituting the offense. Per CALJIC No. 17.02, the jurors were told to decide each count separately.

Kristen S.

Counts 2 and 4 each alleged an act of unlawful sexual intercourse at defendant's Newport Beach apartment in January 1992. (Pen. Code, section 261.5.) Defendant complains Kristen's testimony only supports one count of intercourse during that time period and the evidence to sustain count 4 "was incompatible with the entire state of the evidence." He also complains Kristen's memories of these incidents were vague and improperly "refreshed" with a "diary" compiled at the Provo school.

The record shows Kristen, using a document summarizing a diary she kept at the Provo school, described an incident near the end of January where she felt like she was raped and a second encounter between January 9 and the "rape" incident. Sergeant O'Sullivan confirmed Kristen told him she lived with defendant in January 1992 before she moved to Pfarr's apartment and the pair had sexual relations two to three times a week.

Count 9 alleged an act of oral copulation in defendant's car around June 1-15, 1992. (Pen. code, __288a, subd. (b)(1).) Defendant argues Kristen had no independent recollection of any such event. Per Evidence Code section 771, her recollection was refreshed with notes from her

conversations with Sergeant O'Sullivan at the school in Utah. She then testified regarding the encounter.

Defendant complains these "notes" were recorded months after the events actually occurred and they were prepared when Kristen was under significant pressure to cooperate with the authorities. Section 771 does not require that such notes be written contemporaneously with the events recorded. And nothing in the record supports defendant's claim that Kristen was coerced to cooperate with the officers in their investigation. The jury heard all of the evidence and concluded Kristen was telling the truth. It is not our office to reweigh this testimony.

Shauna C.

Counts 13 and 14 alleged acts of unlawful sexual intercourse at defendant's apartment during the month of September 1993. (Pen. Code, § 261.5) Defendant complains Shauna recounted five different sexual encounters with defendant from September 17 to October 12, 1993.: "The evidence thus proves nothing more than that defendant had sex with Shauna five times on or after September 17, 1993, before she gave a statement to Detective Prouty on October 12, 1993. Other than for the September 17th act in Count 13, it cannot be determined from the evidence on what dates in September or October acts of unlawful sexual intercourse occurred."

Not so. Shauna did describe two different incidents of intercourse at defendant's apartment: the first on September 17, the second approximately one week later. This was sufficient to support the convictions on counts 13 and 14.

Defendant next challenges sufficiency of the evidence to support count 17, one of three penal Code section 261.5 counts including the date of October 9, 1993.[3] The argument is premised on Shauna's poor recall of dates, times, and

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3 Defendant does not challenge the convictions on counts 15 and 16.

conversations and her status as a self described "compulsive liar." Here, Shauna specifically testified she had intercourse with defendant the Saturday before she met Detective Prouty for the first time, October 12, 1993. That Saturday was October 9. Accordingly, Shauna's testimony was sufficient to support the conviction on count 17.

Shauna recounted numerous instances of sexual intercourse in defendant's car near UCI on December 13 and 17, 1993. Count 24 charged a similar encounter on January 3, 194. Defendant argues the victim's testimony was vague concerning the times, places, and dates of these incidents, and she had no independent memory of these events aside from the "chronology" Sergeant O'Sullivan prepared.

Again, the record reveals the evidence was sufficient to support the convictions. Shauna testified she had intercourse with defendant in a Sizzler parking lot near the UCI campus on December 13 and 15. She recalled there were three such encounters in December 1993. According to Sergeant O'Sullivan, Shauna did mention a third incident, occurring on December 17. Shauna also confirmed she had intercourse with defendant in his car near UCI on January 3, 1994.

Counts 27, 28, and 30 charged defendant with unlawful sexual intercourse at a Tustin motel on February 22, 24, and March 8, 1994, respectively. Shauna recalled having sexual intercourse and oral copulation with defendant in various Tustin motels on February 4, 16, and 26 and March 3 and 9, 1994. O'Sullivan testified Shauna, after defendant's March 14, 1994 arrest, identified the "key Inn," as one of the locations where the couple engaged in sexual acts. Records subpoenaed from this Tustin motel showed defendant registered under the false name "Ron Scarpello" on February 22 and 25 and March 3 and 8. Ron Scarpello, it will be recalled, was the name defendant used on his counterfeit driver license.

Defendant complains the dates described do not match the precise dates charged on the information. That may be

true, but evidence described the general "on or about" time periods set forth in the charges. (See *People v. Jones*, *supra*, 51 Cal.3d at p. 305.["even a mature victim might understandably be hard pressed to separate particular incidents of repetitive molestations by time, place or circumstance"].) We note defendant was arrested while driving Shauna to a Tustin motel and the Scarpello license and condoms were found in his possession at that time.

Defendant also complains about various conflicts in the record, attacking the credibility rather than the admissibility of certain prosecution evidence. But these conflicts were already resolved in the People's favor by the trier of fact. (*People v. Torres* (1996) 43 Cal.App.4th 1073, 1078.)

IV

Defendant next complains the court erred in admitting evidence of uncharged sexual offenses involving the same victims to demonstrate lewd intent.[4] He claims the evidence is inadmissible under *People v. Ewoldt* (1994) 7 Cal.4th 380 and any potential prejudice outweighed the probative value. (Evid. Code § 352.) We disagree.

Pursuant to Evidence code Section 1101, subdivision (a), evidence of specific instances of uncharged misconduct

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4 On redirect the prosecutor elicted, over defense counsel's objection, details of defendant's sexual contacts with Kristen from December 23, 1991 through January 8, 1992. The court found the questions were proper in that the prosecutor sought information to rebut the thrust of cross-examination.

Defense counsel also objected to questions on direct examination regarding defendant's uncharged sexual contacts with Shauna, claiming the informaqtion was irrelevant, did not comply with Evidence Code section 1101, subdivision (b), and the prejudice outweighed any probative value. The court found the evidence was admissible because it tended "to establish that (defendant's) intent was sexual gratification or passioin ... with regards to a particular victim." Per Evidence Code section 352, the court also determined the probative value of the evidence outweighed any prejudice.

is inadmissible " if the inference it directly seeks to establish is solely one of propensity to commit crimes in general, or of a particular class." (People v. Moon (1985) 165 Cal.App.3d 1074, 1079.) Section 1101, subsdivision (b) makes such evidence admissible if it is relevant to establish some fact other than bad character or disposition. Here, evidence of uncharged acts was admissible to prove defendant's lewd intent towards the respective victims: "Courts have long held that in cases involving sex crimes, evidence of other, not too remote, sex offenses with the prosecuting witness is admissible because it is relevant to show a 'lewd disposition or intent of the defendant toward that witness . . . . '[W] hen the uncharged offense evidences the emotion of sexual passion toward a particular individual the statutory exclusion [of Evidence Code section 1101, subdivision (a)] is inapplicable.'" (*People v. Moon*, *supra*, 165 Cal.App.3d at p. 1079.) As *Ewoldt* explains, corroboration of the prosecuting witness' testimony regarding the uncharged acts is no longer a condition of admissibility. Such evidence is reviewed on a case by case basis under an Evidence code section 352 analysis. (*Ewoldt, supra*, 7 Cal.4th at pp. 407-408.)

In each case, the uncharged acts evidence involved the same perpetrator and the same victim. The uncharged acts were close in time to the charged offenses and were probative of defendant's intent toward each victim. On these facts, the court properly determined section 1101, subdivision (b) did not require the exclusion of the uncharged conduct evidence

That is not the end of our inquiry, however. Defendant also contends the probative value of the uncharged crimes evidence was substantially outweighed by the danger that its admission would create undue prejudice. (Evid. Code __ 352.) But as the court noted, the evidence regarding uncharged acts was no stronger and no more inflammatory than the testimony detailing the charged offenses. There is no reasonable probability the jury disregarded testimony regarding the charged crimes and returned a conviction based on the evidence of the uncharged offenses. Accordingly, we

discern no abuse of discretion in the admission of the uncharged crimes evidence.

In any event, the court also gave CALJIC No. 10.61 limiting instruction: "Evidence has been introduced for the purpose of showing that the defendant and the person named in the information engaged in sexual activity on one or more occasions other than that charged in the case. [¶] Such evidence if believed, may be considered by you only for the limited purpose of indicating, if it does so indicate, the disposition or intent of the defendant toward such person. [¶] You must not consider such evidence for any other purpose." There was no error here.

V

Defendant next argues the court erred in admitting Sergeant O'Sullivan's testimony regarding his September 29, 1992 conversation with Kristen S. pursuant to Evidence code sections 356, 791, and 1236. The court found the testimony was admissible to rebut charges o fabrication raised when defense counsel cross-examined Kristen on the same topic.

To discredit Kristen's testimony, defense counsel repeatedly referred to her conversation with O'Sullivan on September 29, 1992, comparing and contrasting variances in her trial testimony. At one point, defense counsel asked Kristen this question: "Now, Sergeant O'Sullivan at some time later told you that isn't good enough because e that's in Los Angeles and we cant get [defendant] for anything in L.A. County; isn't that right?"

Defense counsel objected and the court held an Evidence code section 402 hearing when the prosecutor asked O'Sullivan about the conversation on redirect examination. The court found defense counsel "opened the door" to this line of inquiry when he focused his cross-examination of Kristen on that conversation and gave the impression her testimony was fabricated.

Per Evidence Cod section 356, "Where part of [a] ... conversation ... is given in evidence by one party, the whole on the same subject may be inquired into by an adverse

party." (See *People v. Arias* (1996) 13 Cal.4th 92, 156.)Defendant introduced a selected portion of the September 29, 1992 conversation. Under section 356, the prosecutor was likewise entitled to explore other portions of the same conversation relating to the same topic. The evidence was introduced to rebut defense counsel's suggestion that Kristen lied on the stand because she did not make the same accusations when she spoke to O'Sullivan.

O'Sullivan's testimony was also admissible under section 791 and 1236 as a prior consistent statement.[5] Defense counsel claimed Kristen fabricated her trial testimony regarding her first sexual encounter with defendant and her sexual relations with him in January and February 1992, when she learned her original statements were not sufficient to support a successful prosecution. To rebut the accusation, the prosecutor introduced O'Sullivan's testimony to show Kristen's statements at trial were consistent with her earlier remarks on September 29. Accordingly, we find Evidence Code section 791 and 1236 also support the admission of this evidence.

VI

Defendant next insists his right to a fair trial was undermined by prosecutorial misconduct. During the first recess, the prosecutor declined defense counsel's request to remove a then-crying Kristen and her mother from a public hallway where the jurors were also present. When the trial

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5 Section 1236 states, "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with section 791." Section 791 provides, "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after ... (b) an express or implied charge has beeen made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen."

resumed, defense counsel accused the prosecutor of deliberate misconduct and demanded a new jury. Alternatively, he asked the court to question the jurors to determine what they observed and their reaction to it, if any.

The court refused to declare a mistrial and denied defense counsel's requests to question the jurors individually or impanel an entirely new jury. The panel was admonished not to consider evidence received or observations made outside the courtroom and that sympathy should play no part in their decision-making process.

Defendant now claims the prosecutor's extrajudicial conduct was designed to promote sympathy for "for the youthful victim and her family." He also contends no admonition could have cured the "overwhelming prejudice" caused by the jurors' observation of the sobbing witness and her mother.

Defendant does not cite, nor has our research revealed, any relevant authority to support the notion that the prosecutor's refusal to remove the witness from the hallway was an improper appeal for juror sympathy. The rule is this: "A prosecutor's rude and intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the whole trial with such unfairness as to make the conviction a denial of due process. [Citations.] But conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Espinoza* (1992) 3 Cal.4th 806, 820, internal quotation marks omitted.)

The prosecutor's refusal to remove the witness from the hallway may have cost him the Lady Bing trophy, but it did not constitute a pattern of egregious conduct rendering the trial fundamentally unfair. Nothing in the record suggests the prosecutor intended to manipulate the jurors and promote sympathy for the complaining witness. In any event, the court immediately admonished the jurors such observations were not evidence and sympathy should not enter the decision-making process. This persuades us any perceived

prosecutorial misconduct was harmless. (See *People v. Watson* (1956) 46 Cal.2d 818.)

VII

Defendant contends the tape recording of his telephone conversation with Shauna was inadmissible because it was obtained in violation of his Sixth Amendment right to counsel. Alternatively, he complains o the court's failure to give limiting instruction cautioning the jurors to consider this evidence only as proof of the Shauna offenses. neither contention has merit.

People v. Plyler (1993) 18 Cal.App.4th 535 is dispositive of this issue.[6] There, defendant was arrested for molesting a young girl and retained an attorney. A few days later, a detective arranged to tape record a phone conversation between defendant and another suspected molestation victim, Tina. Citing McNeil v. Wisconsin, supra, 501 U.S. 171, the Court of Appeal noted the right to counsel was "offense-specific" and concluded the defendant could not raise a Sixth Amendment claim if no charges were pending as to Tina: "[A]t the time of the recordings, no attachment of the Sixth Amendment right had occurred with respect to the subsequently charged offenses involving Tina ... [T]he charged offenses against [the first victim] did not involve Tina. They occurred at separate times and places. Neither girl was present during the charged offenses in which the other was the victim. We are confident that the offenses involving [the first victim] did not embrace the offenses against Tina for purposes of attachment of the Sixth

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6 Defendant relies on *United States v. Melgar* (4th Cir. 1998) 139 F.3d 1005. Melgar acknowledges the right to counsel is "offense specific" per *McNeil v. Wisconsin* (1991) 501 U.S. 171. Defendant in Melgar argued the investigation of the "new " crime was "inextricably intertwined" with the "old" charges. But he correctly asserted "his later federal offenses involve the same time, place and conduct as the pending state offenses" (*Id.* at p. 1014.) That is not the case here.

Amendment." (*People v. Plyler, supra*, 18 Cal.App.4th at p. 547, fns. omitted.)

Plyer specifically rejects the 'closely related' offense exception, a doctrine extending the right to counsel to investigations in cases relating to the same type of offense, occurring around the same place and time. (Ibid.; but see *People v. Clair* (1992) 2 Cal.4th 629, 658 [disapproving this line of authority to extent it supported the proposition that Sixth Amendment right is not offense specific.}.)

Defendant next claims his case falls within the "inextricably intertwined exception to the "offense-specific" requirement. (See *United States v. Martinez* (9th Cir. 1992) 972 F.2d 1100, 1103-1104 [exception applies where pending charge so "inextricably intertwined" with charge under investigation that right to counsel cannot be isolated between pending and uncharged offenses].) He is wrong. As *Martinez* explains, the exception only applies where the case involves multiple prosecutions based on identical facts; it does not apply when any new or additional crimes are involved. (*Id.* at p. 1103)

Defendant next faults the court for its failure to give an appropriate limiting instruction explaining the tape recording was admissible as evidence in Shauna's case only. The record reveals the court recognized the cross-admissibility of the charges under Evidence code section 1101 as evidence of common scheme or plan and agreed to give the standard CALJIC No. 17.02 instruction:[7] "Each count charges a

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7 "I appreciate the problem when you have a multiple vitims of similar conduct, similar criminal conduct, and they're tried together. The existence of more than one victiim always has impact upon the general trier of fact. (sic) [¶] *I'll have to advise the jurors, of course, that the evidence afforded relates to the specific counts and will instruct them appropriately. Each count has to be decided upon its evidence insofar as its common scheme and design. We'll instruct them on that too.* [¶] But as the as the now sits as the court sees it from a *M[a]assiah* Sixth Amendment problem, that the investigation into Shauna was independent of the investigation into kristen, and the communication did not in any way involve the facts of the Kristen S.

distinct crime. You must decide each count separately. The defendant may be found guilty of any or all of the crimes charged."

Defendant agreed to the instructions given and did not request any clarification or amplification instructions on this issue. Accordingly, any objection on this point was waived. (*People v. Wader* (1993) 5 Cal.4th 610, 635.) In any event, any error could only have been harmless. Given the sum of the evidence against defendant, there is no reasonable probability he would have obtained a more favorable outcome absent the admission of the tape-recorded conversation.

VIII

Defendant next argues the court erred in admitting (1) the tape-recorded telephone call Kristen made to him and (2) portions of certain microcassette tapes he recorded himself, claiming the evidence was unduly prejudicial and of minimal probative value. (Evid. Code, § 352.)

Trial courts have broad discretion to determine the admissibility of evidence under Evidence Code section 352. (See, e.g., *People v. Kwolek* (1995) 40 Cal.App.4th 1521, 1532.) We cannot say that discretion was abused here. Defense counsel objected to the admission of defendant's November 8, 1994 phone conversation with Kristen on the grounds the call was irrelevant in that it consisted , for the most part, of accusations by Kristen accompanied by defendant's denials. The court disagreed, concluding the tape contained defendant's admissions, and the discussion was probative of the relationship between them.

We agree. During the conversation, defendant admitted having a sexual relationship with Kristen, his "love" for her, his desire to live with her as his girlfriend, and that he had told former girlfriend Romero about the affair. Defendant also indicated he thought the conversation was being taped, but he never denied the affair. Moreover, the entire

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7 (continued) case. And therefore, it would not be a Sixth Amendment violation under *M[a]ssiah*" (Italics added.)

conversation illustrated the relationship between Defendant and Kristen and served to corroborate her testimony. [8]

Defendant raises similar complaints regarding the admission of the tapes he recorded himself. At trial, he claimed the evidence was irrelevant, prejudicial, and replete with hearsay remarks. The court overruled defense counsel's objections, concluding the evidence was relevant and any extraneous remarks had been redacted by the prosecution. On appeal, his challenge is limited to Evidence Code section 352 grounds.

These tapes contain detailed references to Defendant's ongoing sexual relationship with Shauna and corroborated [8] her testimony regarding the time frame for their encounters. Defendant concedes the admissions but complains the tapes were inherently prejudicial in that they "arguably painted a picture of an egoist who spent long hours fantasizing about ways women, including Shauna, could be emotionally manipulated" and "left the impression that [his] conduct of his affairs was somehow religiously inspired or sanctioned."

Defendant's argument misses the mark. Evidence of admissions of the charged crimes was *damaging*, but it was not legally *prejudicial*. (See *People v. Yu* (1983) 143 Cal. App.3d 358, 377.) We are not persuaded the admission of this evidence was an abuse of discretion.

Finally, even assuming the court erred in admitting any of this evidence, there are no grounds for reversal. There is no reasonable probability defendant would have obtained a more favorable outcome had these tapes been excluded from evidence.

Judgment affirmed.

CROSBY, J.

WE CONCUR:

WALLIN, ACTING P.J.

BEDSWORTH, J.

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8. Defendant also contends, for the first time on appeal, that this evidence was cumulative of other testimony. His failure to raise the issue below constitutes a waiver of any appellate review. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1014-1015.)

APPENDIX B

ORDER OF THE SUPREME COURT OF CALIFORNIA

Filed March 31, 1999

Fourth Appellate District, Division Three, No. G017741
S076501

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent

v.

RONALD GERALD BOYAJIAN, APPELLANT

Appellant's petition for review DENIED.

GEORGE,

Chief Justice

APPENDIX C

ORDER OF THE COURT OF APPEAL -- STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION THREE

Filed January 29, 1999

COURT OF APPEAL--STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

PEOPLE OF THE STATE OF CALIFORNIA G017741
Plaintiff-Respondent

v.

BOYAJIAN, RONALD GERALD
Defendant-Appellant

Sup. Ct. No. 93HF0509

ORDER

The petition for rehearing is denied.

CROSBY, J.
CROSBY, J.

We concur:

WALLIN, J.
WALLIN, ACTING P.J.

BEDSWORTH, J.
BEDSWORTH, J.